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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)
PRELIMINARY DECREE

* * * * *

CLAIMANT: Sieben Livestock Co.

OBJECTOR: United States of America (Bureau of Land
Management)

CASE 41I-2002-R-2023

41I 90164-00
41I 90178-00
41I 90179-00
41I 90180-00
41I 205358-00
41I 30129581
41I 30129675
41I 30129692
41I 30129694
41I 30129703

ORDER ON PENDING OBJECTION AND MOTIONS

Sieben Livestock Co. (“Sieben”) objects to an order issued by the Senior Water Master in this basin rejecting Sieben’s counterobjections to its own water right claims. As alternate relief, Sieben asks the Court to either grant a motion to amend the claims or call the claims in on motion for purposes of determining whether they accurately reflect historical use or require modification.

BACKGROUND

The Water Court included the ten claims in this case in the Preliminary Decree for the Missouri River Above Holder Dam Basin (Basin 41I). Sieben Livestock Co. (“Sieben”) owns the claims. All the claims are for stock water use.

The Court issued the Preliminary Decree on June 24, 2022. The Court set a deadline of December 21, 2022 to file objections. The Court sent notice of the decree to all water users in the basin, including Sieben. The Court also published notice of the decree in various regional newspapers and on the Court’s website. The Court later extended the objection deadline to January 20, 2023. The Court provided notice of the objection extension in newspapers and on the Court’s website.

Sieben did not object to any of the claims in this case prior to the extended deadline, nor did anyone else except the United States Bureau of Land Management as to claim 41I 30129703. On April 3, 2023, Sieben filed counterobjections to the ten claims. (Doc. 1.00). On April 14, 2023, the Senior Water Master issued an order rejecting Sieben’s counterobjections. (Doc. 2.00). Sieben responded on April 19, 2023 by filing an “Objection to Order Rejecting Counterobjection Filings, Motion to Amend, and Request to Call Claims in On Motion” (“Response”). (Doc. 3.00). Sieben included with the Response the “Sworn Statement of Chase Hibbard” (“Hibbard Statement”).

DISCUSSION

Sieben raises three issues in its response. First, Sieben argues the Master’s Order conflicts with the Court’s practice of accepting counterobjections to a claimant’s own water rights. Second, Sieben moves to amend its claims to reflect the period of use modifications it seeks in its counterobjections. Third, Sieben asks the Court to call the claims in on motion to address the counterobjections. The Court addresses each issue in turn.

1. Does the Master’s Order conflict with Water Court practice to accept counterobjections to a claimants’ own water right claims?

The Montana Water Use Act sets a specific procedure for filing and addressing objections after issuance of a preliminary decree. The process begins with an objection period. The Act states in plain and mandatory language that objections “*must be filed* with the water judge within 180 days after entry of the temporary preliminary decree, preliminary decree, or supplemental preliminary decree.” Section 85-2-233(2), MCA (emphasis added). The Act allows for extensions of the objection deadline, as was done

in this basin, but extensions do not change the mandatory obligation to file objections within the objection period.

The Act next provides for a counterobjection period, but also states that if a claim receives objections, the Court “must allow an additional 60 days for the party whose claim received an objection to file a counterobjection to the claim or claims of the objector.” Section 85-2-233(3), MCA. The plain language of this provision predicates the right to file a counterobjection on the condition that a claim first receive an objection. The Water Court’s rules state that “[c]ounterobjections must be filed in compliance with § 85-2-233, MCA”.

Lest there be any doubt about the interpretation of the Water Use Act’s counterobjection provision, the Court resolved it in *In re McDowell*, 2019 Mont. Water LEXIS 222 (Order Rejecting Improperly Filed Counterobjection and Request for Hearing). *McDowell* involved a similar set of procedural facts. The claimant did not self-object during the objection period. After the objection period closed, the claimant filed a counterobjection to their own claim. The Court rejected the counterobjection based upon the language and structure of the Act, stating:

[T]he Montana Legislature did not intend the counterobjection period to operate as a second objection period for claimants having missed the objection deadline to raise issues regarding their water rights. Acceptance of counterobjections filed by a claimant to their own water right further delays final decree issuance, disservices claimants filing timely objections, and potentially triggers the need for an additional counterobjection period.

There is no discernable difference between acceptance of *McDowell*'s counterobjection and acceptance of a late objection in violation of the clear statutory deadlines set by the Montana Legislature. The water court declines to consider counterobjections filed by claimants to their own water rights.

McDowell, at *3-4; *see also*, *In re Erb*, 2016 Mont. Water LEXIS 2, *21 (“Erbs’ right to counterobject is triggered by the filing of a timely objection to their claims”); *In re Windbreak Ranch LLC*, 2022 Mont. Water LEXIS 536, *6. (“[t]he right to file a

counterobjection is restricted to those parties whose claims received objections and applies only to the claims of an objector”).

Sieben does not cite these cases, nor does it offer a different analysis as to how the text of the Act can be construed to allow a claimant to counterobject to their own water right claims. Instead, Sieben argues the Water Court has “a long practice of accepting a claimant’s counterobjections to its own water rights”. (Response, at 2). The Court acknowledges that in certain instances, a claimant or party could mistakenly use a counterobjection form to file an objection, or use the counterobjection form to respond to an objection. *See, e.g., Johnson v. Unites States (Dep't of Agric. Forest Serv.)*, 2022 Mont. Water LEXIS 668 (master’s report). However, neither of these scenarios address the fact pattern here where a claimant uses the counterobjection form to attempt to cure the failure to timely file a self-objection. Absent a case or analysis demonstrating why the Court may allow a claimant to circumvent the mandatory objection deadline via the counterobjection process, the Court declines to accept Sieben’s objection to the Master’s order.

2. *Should the Court accept the motions to amend?*

Sieben’s response alternatively asks the Court to accept Sieben’s proposed modifications to the claims by granting motions to amend the claims. Sieben’s motion to amend request falls in two categories: First, a request to expand the period of diversion and period of use to year round for all ten claims; and second, to modify points of diversion and places of use for claims 41I 90179-00 and 41I 205358-00.

The Water Use Act allows a claimant to move to amend a water right claim. Section 85-2-233(6), MCA. Unlike the objection provisions, the Act does not set specific deadlines to file motions to amend, nor does it always bar them after issuance of a preliminary decree. For example, the Court often allows post-decree motions to amend as a procedural mechanism to resolve issue remarks or objections. *E.g., Williams Ranches Inc. v. Josephson*, Case 39F-0062-R-2021; 2021 Mont. Water LEXIS 1093. As a backstop, the Act also provides procedural protections to other water users by requiring additional notice when the Court determines a motion to amend “may adversely affect

other water rights.” Section 85-2-233(6)(a)(i), MCA; *see, e.g., In re Circle S Ranch, Inc.*, Case 41P- 108; 2019 Mont. Water LEXIS 8 (Order on Motion to Modify Claims).

While the Water Use Act does not prohibit post-preliminary decree motions to amend, it also does not authorize them in all circumstances. The motion to amend provision is in the same code section as the objection provisions. When construing the motion to amend statute, the Court must harmonize it in such a way as to not nullify the objection provisions of the statute. Section 1-2-101, MCA; *Mont. Indep. Living Project v. City of Helena*, 2021 MT 14, ¶ 11, 403 Mont. 81, 86, 479 P.3d 961, 964 (courts “construe statutory language as a whole and in light of its surrounding sections to avoid conflicting interpretations”). If parties are allowed to use the motion to amend provisions to cure the failure to file a timely objection, the motion to amend provision would conflict with the objection provisions and cause the objection deadlines to become meaningless. If a post-objection period motion to amend amounts to a disguised late objection, the motion is not within the scope of what the motion to amend statute allows. *See, e.g., Open Cross Ranch, Inc.*, 2019 Mont. Water LEXIS 7 (Order Denying Request to Amend Claim). Were this not the case, it would open the door to claimants using the motion to amend process to cure failure to adhere to statutory objection timeline obligations imposed by the legislature.

Given the interplay between the objection deadline and motions to amend, the Court concludes that Sieben’s motions to amend should not be allowed. Sieben filed the motions to amend shortly after the objection period closed. The motions do not directly respond to issue remarks or objections.¹ The affidavit supporting the motions gives no explanation why a timely objection could not have been filed. There also is no indication Sieben learned information after the objection period closed that was not available previously. The motions do not identify any clerical errors. Absent any such facts, the

¹ The Court recognizes that the abstract for claim 41I 90179-00 contains an issue remark that is more than a notice-only remark. Nothing in this order is intended to preclude a motion to amend to the extent necessary to resolve the remark. However, Sieben’s motion as to this claim is not directed at the issue remark.

Court concludes Sieben's motions are the functional equivalent of late objections, which the Act forbids.

3. *Should the Court call in the claims on motion to address the counterobjections?*

Sieben's final argument asks the Court to use its authority to call claims in on motion to "issue an order to determine whether the above captioned claims as decreed accurately reflect the historical use of the water right claims or whether they should be amended to reflect the historical uses described in Mr. Hibbard's sworn statement." (Response, at 4, *citing* Hibbard Statement). As Sieben accurately notes, the Water Court's adjudication rules allow it to "issue such orders on its own motion as may be reasonably required to allow it to determine whether a claim accurately reflects its claimed pre-July 1, 1973 beneficial use." Rule 8, W.R.Adj.R.; *see Matter of Water Court Procedures*, Case No. WC-92-3, 1995 Mont. Water LEXIS 7 (describing "on motion" authority and process). But that does not mean the Court must issue such orders.

Sieben cites no case where the Court has used its Rule 8 authority to address issues that could have been, but were not, raised in a timely objection. Allowing such a process here also would open the door to providing a procedural mechanism for late objections beyond what the legislature has authorized. Additionally, whether to utilize Rule 8 and address an issue on the Court's own motion is a matter within the Court's discretion. The Court declines Sieben's invitation to exercise that discretion to cure the failure to file a timely objection.

ORDER

Therefore, it is ORDERED, that each of the requests contained in Sieben's Response is DENIED.

ELECTRONICALLY SIGNED AND DATED BELOW

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